



**No. 79-851**

---

---

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1979

---

---

**JOHN CLAUSER,**

*Petitioner,*

**vs.**

**PEOPLE OF THE STATE OF ILLINOIS,**

*Respondent.*

---

---

**Brief for Respondent In Oppisition**

---

**WILLIAM J. SCOTT,**  
Attorney General of the State of Illinois,

**DONALD B. MACKAY,**  
**THOMAS E. HOLUM,**  
Assistant Attorneys General  
188 West Randolph Street (Suite 2200)  
Chicago, Illinois 60601  
(312)753-2570

*Attorneys for Respondent.*

---

---

## INDEX

Jurisdiction .....	1
Questions Presented for Review .....	1, 2
Statement of the Case .....	2
Reasons for Denying the Writ .....	2
I. Where Petitioner's first trial was terminated by dismissal of the indictment, on petition- er's motion for acquittal, for a reason not related to his factual guilt or innocence but because the indictment had been based upon false grand jury testimony, and, addi- tionally, where the trial court's dismissal of the indictment was required by manifest necessity, petitioner's retrial was not barred by double jeopardy .....	2, 3, 4, 5, 6, 7
II. The petitioner's remaining issues, not raised in the state courts below, should not be considered by this court on certiorari, espe- cially where an adequate remedy to those alleged errors may still be pursued in the state courts .....	8, 9
Conclusion .....	10

## TABLE OF CASES

<i>United States v. Scott</i> , 437 U.S. 82, 98 S.Ct. 2187, 57 L.Ed. 2d 65 (1978) .....	4, 5, 6
<i>Illinois v. Somerville</i> , 410 U.S. 458, 93 S.Ct. 1066, 35 L.Ed. 2d 425 (1973) .....	4, 6, 7
<i>Cardinale v. Louisiana</i> , 394 U.S. 435, 89 S.Ct. 1161 (1969).....	8
<i>Hill v. California</i> , 401 U.S. 797, 91 S.Ct. 1106 (1971).....	8
<i>Tacon v. Arizona</i> , 410 U.S. 351, 93 S.Ct. 998, 35 L.Ed. 2d 346 (1973) .....	8
<i>People v. Hopkins</i> , 53 Ill. 2d 452, 292 N.E. 2d 418 (1973).....	3
<i>People v. Lawson</i> , 67 Ill. 2d 449, 367 N.E.2d 1244 (1977).....	3

## STATUTES

Ill.Rev.Stats. 1975, Chap. 38, § 115-4(k) .....	3
---	---

No. 79-851

IN THE

## Supreme Court of the United States

OCTOBER TERM, 1979

JOHN CLAUSER,

*Petitioner,*

vs.

PEOPLE OF THE STATE OF ILLINOIS,

*Respondent.*

## Brief for Respondent In Opposition

Respondent, People of the State of Illinois, respectfully prays that a Writ of Certiorari to review the judgment and opinion of the Appellate Court of Illinois, Third District, entered in this proceeding on June 29, 1979, be denied.

## JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition. However, respondent submits that petitioner has failed to show any reason for this Court to exercise its discretion to grant this Petition for Writ of Certiorari.

## QUESTIONS PRESENTED FOR REVIEW

Whether the petitioner's reindictment and second trial offended double jeopardy, where dismissal of the first indictment was sought by petitioner on grounds not requiring a



factual resolution of his guilt or innocence, and where the dismissal was required by manifest necessity.

Whether the additional issues should be decided by this Court on *certiorari*, where they were never raised previously before any Illinois court, and where petitioner has an existing remedy in Illinois courts for the hearing of these claims.

### STATEMENT OF CASE

Petitioner's Statement of the Case is complete and adequate in most respect. Additional facts not stated by petitioner are set forth in respondent's Reason for Denying the Writ.

### REASONS FOR DENYING THE WRIT

#### I.

**WHERE PETITIONER'S FIRST TRIAL WAS TERMINATED BY DISMISSAL OF THE INDICTMENT, ON PETITIONER'S MOTION FOR ACQUITTAL, FOR A REASON NOT RELATED TO HIS FACTUAL GUILT OR INNOCENCE BUT BECAUSE THE INDICTMENT HAD BEEN BASED UPON FALSE GRAND JURY TESTIMONY, AND, ADDITIONALLY, WHERE THE TRIAL COURT'S DISMISSAL OF THE INDICTMENT WAS REQUIRED BY MANIFEST NECESSITY, PETITIONER'S RETRIAL WAS NOT BARRED BY DOUBLE JEOPARDY.**

During his testimony before the grand jury which returned the petitioner's first indictment, one of the State's principal occurrence witnesses, Officer Harold Brignadello, testified that he personally witnessed certain crucial events involving the

petitioner outside the tavern where the unlawful sale allegedly occurred. (R. 183-88) At petitioner's first trial, cross-examination of Brignadello disclosed that he had in fact not witnessed these events, but had testified from police reports completed by another officer who had been unavailable to testify before the grand jury.

Upon learning of the allegedly improper grand jury testimony, the petitioner moved for an acquittal. The petitioner's motion for acquittal was premature, since the prosecution had not rested and could have presented additional evidence. *Ill. Rev. Stat.* 1975 chap. 38, § 115-4(k). The trial court ruled that even if the State produced no additional evidence, the evidence which they had already presented was sufficient to prove the petitioner guilty. (R. 198-199) The trial court refused to declare an acquittal for this reason.

Under Illinois law, as is true in the overwhelming majority of other jurisdictions, an indictment is not invalid even though it is wholly based upon hearsay testimony. *People v. Hopkins*, 53 Ill.2d 452, 292 N.E.2d 418 (1973) Thus, Officer Brignadello could have testified as to the events outside the tavern relying only upon the notes of another officer, even though he personally had not witnessed the events. Nevertheless his testimony before the grand jury was false and misleading, since he had deliberately misstated the source of his testimony. In Illinois, it has been held that a trial court has inherent power to dismiss an indictment whenever it is shown that the indictment was procured through procedures that violate due process. *People v. Lawson*, 67 Ill.2d 449, 367 N.E.2d 1244 (1977) In view of Brignadello's misleading testimony before the grand jury, the trial court agreed with the petitioner that the indictment was defective. While the court refused to grant petitioner's motion for acquittal before the close of the State's case, he observed that the proper motion by petitioner was a motion to dismiss the indictment, a motion which the trial court granted. (R. 199, 201) The petitioner did not object to this order.

The dismissal of petitioner's first indictment and his retrial upon a new indictment can be justified, against his claim that the second trial violated his Fifth Amendment Guarantee against Double Jeopardy, upon two bases: first, that the dismissal of the indictment was sought by petitioner and was granted for a reason not related to his factual guilt or innocence (*United States v. Scott*, 437 U.S. 82, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978)), and second, that the trial court's dismissal of the indictment, whether or not directly attributable to the petitioner, was required by manifest necessity to uphold the needs of public justice. (*Illinois v. Somerville*, 410 U.S. 458, 93 S.Ct. 1066 35 L.Ed.2d 425 (1973).)

In *United States v. Scott*, *supra*, the defendant was indicted for distribution of narcotics. Both before and during his federal trial, the defendant made motions to dismiss two counts of the indictment for prejudicial preindictment delay, and at the close of all the evidence, the trial court granted his motion. The United States Court of Appeals for the Sixth Circuit dismissed the government's subsequent appeal, concluding that any further prosecution of the defendant would place him in double jeopardy. This Court reversed, holding that the Double Jeopardy Clause's purpose of preventing repeated attempts by the government to convict an individual of an alleged offense is not frustrated by permitting reprosecutions where the defendant himself procured the termination of the trial "without any submission to either judge or jury as to his guilt or innocence . . ." (98 S.Ct. at 2199), and where the basis of the termination is "unrelated to factual guilt or innocence of the offense of which he is accused. . ." (98 S.Ct. at 2198). This Court further stated that an "acquittal" occurs for purposes of double jeopardy " . . . only when the ruling of the judge, whatever its label, actually represents a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged. (98 S.Ct. at 2196-97) In the instant case, the trial court ruled that even if the State produced no additional

evidence, the petitioner had already been proved guilty beyond a reasonable doubt, but that the indictment, since procured by misleading testimony, was defective and must be dismissed. The petitioner objected neither to this characterization of his motion nor to the entry of the court's order dismissing the indictment. Clearly, the petitioner's motion for an acquittal was in reality either a motion to dismiss the indictment or a motion for a mistrial, neither of which would foreclose retrial on the ground of double jeopardy. *United States v. Scott*, 98 S.Ct. 2187. Hence, the original indictment having been dismissed at his insistence on a ground not related to the sufficiency of the State's case, the petitioner cannot now successfully claim that a reindictment subjects him to double jeopardy.

Furthermore, the petitioner should not be permitted to seek the dismissal of the indictment at the trial on grounds not reaching the merits and then later argue that the dismissal which he obtained was improper. *United States v. Scott*, *supra*, holds that such conduct is excluded from the protection envisioned in the Double Jeopardy Clause. Clearly, where the defendant has actively sought the dismissal of the original charges not on the merits, the State should not be barred from recharging the defendant and completing its proof of the offense. The dismissal of the first indictment in the case at bar was a *Scott* dismissal, i.e., it was not based on the merits of the case.

It should be noted, parenthetically, that the dissent of Mr. Justice Brennan in *Scott*, joined in by three other Justices of this Court, objected to the new *Scott* rationale, overruling *United States v. Jenkins*, 420 U.S. 358, 95 S.Ct. 1006, 43 L.Ed.2d 250 (1975), on the basis that the mistrial had been declared *sub silencio* upon a finding that the defendant had proved on factual grounds an absolute affirmative defense to the charge—that he had demonstrated that his right to a fair trial had been prejudiced by the State's delay in obtaining the



indictment. As stated by Mr. Justice Brennan, "[u]nder today's decision, the thousands of state and federal courts will be required to decide, with only minimal guidance from this Court, the question of the double jeopardy consequences of all favorable terminations of criminal proceedings on the basis of affirmative defenses." (98 S.Ct. at 2199). Further, the affirmative defense in *Scott*, if proved, was incurable; i.e., the defect could not be cured or removed by reindictment, since the prejudice caused by delay would not only remain, but be exacerbated. Contrawise, the defect in the instant case was not an affirmative defense, like insanity, entrapment, and other defenses listed in the dissent, which provide absolute defenses in the form of "legal justification" and which require a resolution of "factual issues pertaining to guilt or innocence," but rather the defect in this case was a procedural error, which nonetheless could result in reversal on appeal or on federal habeas corpus. Furthermore, the defect in the instant case was not incurable as in *Scott*, but could be removed by simple reindictment, without further prejudice to the petitioner.

The dismissal of the petitioner's first indictment was also justified on a second and entirely separate ground, that it was required by manifest necessity and the ends of public justice. *Illinois v. Somerville*, 410 U.S. 458, 93 S.Ct. 1066, 35 L.Ed.2d 425 (1973). In *Somerville*, the defendant was brought to trial under an indictment for theft containing a defect that under Illinois law could not be cured by amendment and that on appeal could be asserted to overturn any judgment of conviction. After the jury was impanelled and sworn, jeopardy having attached, the defect was discovered and the trial court granted the State's motion for a mistrial. The defendant was reindicted and retried over his objection on double jeopardy grounds. On *certiorari*, this Court upheld the defendant's reindictment and retrial on the basis that a mistrial was required by "manifest necessity," in light of the newly-discovered defect:

If a mistrial were constitutionally unavailable in situations such as this, the State's policy could only be implemented by conducting a second trial after verdict and reversal on appeal, thus wasting time, energy, and money for all concerned. Here, the trial judge's action was a rational determination designed to implement a legitimate state policy, with no suggestion that the implementation of that policy in this manner could be manipulated so as to prejudice the defendant. . . . Here, the delay was minimal, and the mistrial was, under Illinois law, the only way in which a defect in the indictment could be corrected. Given the established standard of discretion set forth in *Perez*, *Gori*, and *Hunter*, we cannot say that the declaration of a mistrial was not required by 'manifest necessity' or the 'ends of public justice.'

(93 S.Ct. at 1973; citations omitted in original.) This Court went on to rule that where the declaration of a mistrial implements a reasonable state policy and aborts a proceeding that at best would have produced a verdict that could have been upset at will by one of the parties, the defendant's interest in proceeding to verdict is outweighed by the competing and equally legitimate demand for public justice. (93 S.Ct. at 1074) The same factors obtain in the instant case. Here also, after jeopardy had attached, a defect was found to exist in petitioner's indictment which could not be cured without reindictment, and which could be raised by petitioner at any time on appeal or habeas corpus to nullify any resulting verdict. To have required the State to proceed under such a disability would have caused a useless waste of State and judicial money and manpower. Since the petitioner's speedy reindictment caused him no discernible prejudice, his reindictment and retrial were clearly justified by the demands of manifest necessity.

## II.

**THE PETITIONER'S REMAINING ISSUES, NOT RAISED IN THE STATE COURTS BELOW, SHOULD NOT BE CONSIDERED BY THIS COURT ON CERTIORARI, ESPECIALLY WHERE AN ADEQUATE REMEDY TO THESE ALLEGED ERRORS MAY STILL BE PURSUED IN THE STATE COURTS.**

Petitioner raises five additional reasons for granting the writ, alleging error by trial and appellate counsel in failing to object to certain evidence at trial or raise certain issues on appeal. None of these issues have been raised by petitioner in any Illinois court, and for this reason they are prematurely raised for consideration by this Court on *certiorari*. *Tacon v. Arizona*, 410 U.S. 351, 93 S.Ct. 998, 35 L.Ed. 2d 346 (1973); *Hill v. California*, 401 U.S. 797, 91 S.Ct. 1106 (1971); *Cardinale v. Louisiana*, 394 U.S. 437, 89 S.Ct. 1161 (1969). In *Cardinale*, *supra*, this Court stated:

It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions. . . .

\* \* \* \*

In addition to the question of jurisdiction arising under the statute controlling our power to review final judgments of state courts, 28 U.S.C. § 1257, there are sound reasons for this. Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And, in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground. Even though States are not free to avoid constitutional issues on inadequate state grounds, *O'Connor v. Ohio*, 385 U.S. 92, 87 S.Ct. 252, 17 L.Ed. 2d 189 (1966), they should be given the first opportunity to consider them.

(89 S.Ct. at 1162, 1163)

Counsel for petitioner candidly admits that these additional issues have never been presented to the Illinois courts, and that even now he is preparing a post-conviction petition in order to present these claims to the State court. (Petitioner's Petition for Writ, etc., p. 4, footnote\*) Such claims as petitioner here presents are justiciable in Illinois under the Illinois Post-Conviction Hearing Act, and are routinely decided on the same theories of law as here propounded by petitioner. Petitioner does not claim that he lacks a proper forum for hearing of these claims. Comity requires that the courts of Illinois be given the first opportunity to consider them.



**CONCLUSION**

For the foregoing reasons, People of the State of Illinois, respondent, respectfully request that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

**WILLIAM J. SCOTT,**  
Attorney General of the State of Illinois,

**DONALD B. MACKAY,**  
**THOMAS E. HOLUM,**  
Assistant Attorneys General  
188 West Randolph Street (Suite 2200)  
Chicago, Illinois 60601  
(312)793-2570

*Attorneys for Respondent.*